IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL MISC.APPLICATION No 5181 of 1999

For Approval and Signature:

Hon'ble MR.JUSTICE D.P.BUCH

==========

1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

---

VIRAL C TRIVEDI

Versus

STATE OF GUJARAT

---

Appearance:

MR BS PATEL for Petitioners

Mr K G Sheth, Asst.PUBLIC PROSECUTOR for Respondent No. 1

DR MAHESH THAKAR for Respondent No. 2

---

CORAM : MR.JUSTICE D.P.BUCH

Date of decision: 26/09/2000

ORAL JUDGEMENT

This is an application filed under section 482 of the Criminal Procedure Code, 1973 (for short, 'the Code') by original accused No. 3 and 4 in criminal case

No.2105/95 for quashing the complaint filed against them by the second respondent. The said complaint has been filed by the second respondent against the petitioners and other accused persons before the learned Judicial Magistrate First Class, Vadodara for offences punishable under Section 138 of the Negotiable Instruments Act. (for short, 'the Act'). It can be gathered from Annexure 'A' that the complaint was filed against four accused persons and out of those four persons, the present petitioners stand as accused No.3 and 4 respectively. They have submitted application before the trial court showing that they were not Directors of the Company at the relevant point of time and, therefore, they may be exonerated outright. In the said case, the application has been dismissed and therefore, the petitioners preferred Revision Application No..73/99. There also the same contention was taken. But the learned Addl.Sessions Judge, Vadodara dismissed the said Revision on 8.6.1999.

2. Feeling aggrieved by the aforesaid two judgments, the petitioners preferred this Criminal Misc.Application under Section 482 of the Code for quashing the complaint filed against them.

Notice was issued at the first instance and thereafter, Rule was issued on 19.9.2000. Mr Thakker, learned Advocate appears for the contesting respondents. Mr K G Sheth, learned APP appears for the State. I have heard the learned Advocates for the parties and have perused the papers.

3. It is very clear that two cheques were issued on 31.5.1994 on behalf of the Company which is accused No.1 before the trial court. The said cheques were presented by the second respondent for payment and the same were dishonoured on 16.11.1994. Thereafter, the second respondent issued notice on 19.11.1994. However, no payment was made and, therefore, the complaint was filed on 28.12.1994 by the second respondent against the two petitioners and other accused persons showing that accused no.1 was a Company, accused No.2 & 3 were the Directors of the said Company. It has been contended in the complaint that the cheques were issued and they were dishonoured and no arrangement was made for payment of money shown in the cheques and therefore, the petitioners and other accused persons were guilty of offence punishable under the Act. Therefore, the said complaint was failed. After service of process, the petitioners and other accused persons appeared before the trial court and contended that they were not responsible to answer the complaint and, therefore, they should be exonerated

as said above. But the petitioners failed to satisfy the trial court as well as the Sessions Court and hence the present petition.

4. It has been contended on behalf of the petitioners that the present petitioners had tendered resignation on 1.11.1994 and the same has been registered in the office of the Registrar of Companies and, therefore, the petitioners ceased to be the Directors of the said Company w.e.f. 1.11.1994. It has been contended that the petitioners have not been served with notice and, therefore, the complaint is not maintainable against them. It is also contended that the petitioners are not the persons incharge or responsible to answer the complaint of the complainant. On this consideration, it has been submitted that the present petition be allowed and the complaint of the complainant i.e. the second respondent against the petitioners be quashed. It has also been contended that the petitioners are not shown to be persons responsible for the day-to-day affairs of the company. On going through the complaint, it is found that it has not been specifically alleged that these petitioners are not responsible for the day-to-day affairs of the company. Learned Advocate for the contesting respondent has argued that the allegations have been mentioned in para 5 of the complaint which can be reproduced as under:

> "5. That the complainant then sent a legal notice dated 19.11.1994 to the accused under section 138 (b) of the Act as amended up-to-date bringing to his knowledge about dishonour of the cheques by his bankers and requested the accused to make the payment within 15 days from the date of receipt of the said notice and the said notice was duly received by the accused.
>
> However, despite the service of the said notice the accused did not make the payment of the dishonoured cheques to the complainant. The payment has not been made with ulterior reasons by the accused who malafidely knowingly deliberately and intentionally issued the said cheques."

On going through the above para, I am of the view that it is nowhere alleged in this para that the present petitioners were/are responsible for the day-to-day affairs of the said company. The learned Advocate for the respondent has taken me through the provisions contained din section 141 of the Act. Sub-section (1) of

section 141 is reproduced as under:

"141. Offences by companies - (1) If the person committing an offence under Section 138 is a company, every person who, at the time the offence was committed, was in charge of, and was responsible to the company for the conduct of the business of the company, as well as the company, shall be deemed to be guilty of the offence and shall be liable to be proceeded against and punished accordingly;

Provided that nothing contained in this sub-section shall render any person liable to punishment if he proves that the offence was committed without his knowledge, or that he had exercised all due diligence to prevent the commission of such offence."

On a bare reading of section 141 of the Act, it is very clear that when the offence has been committed by a person under section 138 is a company, every person who, at the time the offence was committed, was incharge of, and was responsible to the company for the conduct of the business of the company.

5. Therefore, it is clear that before a person is alleged to be an offender or is alleged to have committed an offence punishable under section 138 of the Act, it is necessary to allege that such a person was incharge or was responsible to the company for the conduct of the business of the company. These two allegations are not found in the complaint.

6. Learned Advocate for the respondent has argued that the petitioners are generally not in a position to get information about the fact as to who is responsible for the day-to-day affairs of the company. However, this argument will not hold good. It is not the case of the second respondent that efforts have been made and yet such information could not be collected. It is also not the case of the complainant that such information was sought by the petitioners from the company and yet the second respondent was not provided such information. The fact remains that there is nothing on record to show that the present petitioners were responsible for the day-to-day affairs of the company and, therefore, the aforesaid ingredia of section 141 of the Act has not been satisfied and consequently the complaint against these two petitioners is ex-facie not tenable. So far as the issue of notice is concerned, it is not much in dispute

that the petitioners are not served with notice under Section 138 of the Act. At the same time, it is a fact that the present petitioners were not the signatories and it has been laid down in a case of B B Mehta v. State of Gujarat (1999 (2) GLR 1322 that it is not obligatory on the part of the drawee of the cheque to give individual notice to all the partners/directors of a partnership firm/company and that no person other than the drawer of the cheque is required to be given notice under section 138 of the Act. The present petitioners were not signatories and, therefore, no notice was required to be served upon them. Therefore, the complaint cannot be said to be untenable in absence of notice given to them.

7. So far as the third point is concerned, it has been contended that the petitioners were Directors of the company-accused no.1 before the trial court but they had resigned from their position w.e.f. 1.11.1994 and intimation has also been given to the Registrar of Companies. The cheques have been refused and returned by the bank on 16.11.1994. Therefore, on the date on which the cheques were returned, they were not the Directors of the Company i.e. accused no.1. Therefore, they are not responsible to answer the complaint of the complainant.

8. It has been argued at length on behalf of the contesting respondent that it is not permissible for the Directors to send such information to the Registrar of Companies on a later date. That if penalty is paid, the entry can be posted showing earlier date of acceptance of resignation or change in the affairs of the company. Form no.32 submitted by the learned Advocate for the respondent shows that the information was received by the Registrar of Companies on 27.11.1994. It therefore, cannot be said that the information was sent late and it is bogus or wrong entry showing with retrospective effect that the petitioners have been out of the company since 1.11.1994. Hence it cannot be said that though the petitioners were still Directors of the company at the relevant point of time, the aforesaid entry has been posted with a view to exonerate them with retrospective effect. But the fact remains that it is a matter of record that the petitioners have been out of the company as Directors since 1.11.1994. Even the lower courts have recorded finding of fact that the petitioners were not Directors of the Company at the relevant point of time. Even the learned Addl.Sessions Judge has also recorded the same finding of fact. When the learned Magistrate as well as the learned Addl.Sessions Judge have recorded findings of fact that the petitioners were not Directors of the company at the relevant point of time, it would

not be open for this court, exercising powers under section 482 of the Code, to differ from the findings of fact recorded by the two courts below.

9. In the aforesaid view of the matter, it is clear that the petitioners were not Directors of the company i.e. accused no.1. at the relevant point of time. They cannot be held to be responsible to answer the complaint. In the result of the aforesaid discussion, it is clear that the petitioners were not Directors of the Company at the relevant point of time and, therefore, they are not responsible to answer the complaint of the complainant. On the other hand, it is also clear that they are not alleged to be Directors who were responsible for the day-to-day affairs of the Company as per the complaint and hence they are not answerable to the complainant. Consequently this is a fit case wherein the complaint should not proceed against the petitioners. It would be open to the second respondent to proceed against the remaining accused persons according to law. In that view of the matter, the complaint deserves to be quashed against the petitioners.

10. Learned APP Mr K G Sheth states that the plea was recorded and thereafter the aforesaid move was made and, therefore, the complaint should not be quashed. Simply because the plea has been recorded, it cannot be said that the complaint should proceed against the accused persons. In that view of the matter, the present petition is allowed. Criminal Case no. 2105/95 pending before the learned Judicial Magistrate First Class, Vadodara is ordered to be quashed qua the present petitioners only. The trial court will proceed further against the remaining accused person in accordance with law.

Rule is made absolute to the aforesaid extent.

26.9.2000 [D P Buch, J.]
msp.